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12 INC. AND BRADLEY SMITH

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 OAKLAND DIVISION

11 U.S. EQUAL EMPLOYMENT  
12 OPPORTUNITY COMMISSION,

13 Plaintiff,

14 v.

15 FIDELITY HOME ENERGY, INC., a  
16 California corporation; BRADLEY SMITH, an  
individual; and DOES 1-49,

17 Defendants.

CASE NO. 4:19-CV-01231-JSW

DEFENDANT'S MOTION TO DISMISS TO  
PLAINTIFF-INTERVENOR'S FIRST  
AMENDED COMPLAINT IN  
INTERVENTION; MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
THEREOF

Date: October 25, 2019  
Time: 9:00 a.m.  
Ctrm: 5  
Judge: Hon. Jeffrey S. White

18 **NOTICE OF MOTION AND MOTION**

19 PLEASE TAKE NOTICE that on October 25, 2019, at 9:00 a.m., or as soon thereafter as the  
20 matter may be heard in the above-entitled court, Defendants Fidelity Home Energy, Inc., a California  
21 corporation and Bradley Smith, an individual ("Defendants"), will and hereby do move the Court for  
22 an Order dismissing all of Plaintiff-Intervenor Ayesha Faiz's ("Plaintiff-Intervenor") claims against  
23 Bradley Smith in the First Amended Complaint in Intervention ("FAC") in their entirety, pursuant to  
24 Federal Rule of Civil Procedure 12(b)(6.) Defendant FHE further moves for the Court for an Order  
25 dismissing Plaintiff-Intervenor's fourteenth through eighteenth claims as barred by the applicable  
26 statute of limitations. This motion to dismiss is made on the grounds that the aforementioned  
27 Plaintiff-Intervenor's FAC in Intervention and each and every cause of action therein fails to state a  
28 claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

This case may be new in federal court, but it is not new to the parties. The events Plaintiff-Intervenor alleges give rise to her various claims occurred during her employment of less than a month at the end of 2015. Plaintiff-Intervenor first filed a state law claim against her former employer FHE in 2017. Recently that state action was dismissed without prejudice by the court. Plaintiff-Intervenor never named Bradley Smith as a defendant in the state law action, even though at all times Plaintiff-Intervenor knew that he was the CEO. The statute of limitations for Plaintiff-Intervenor's claims has run. Plaintiff-Intervenor cannot now, nearly four years after her employment ended, name a brand-new party years after her claims against him have been barred by the statute of limitations.

The introduction of Bradley Smith as a defendant is not the only statute of limitation issue apparent from the face of the First Amended Complaint in Intervention (“FAC”.) Plaintiff-Intervenor alleges five claims that are each barred by their applicable statutes of limitations and she has no facts to support a legal theory of equitable tolling. Ultimately, Plaintiff-Intervenor’s 14<sup>th</sup> through 18ths claims fail to state a claim upon which relief can be granted, pursuant to F.R.C.P. Rule 12(b)(6), because they are each time barred.

## II. FACTUAL BACKGROUND

Plaintiff-Intervenor was hired as an employee of Defendant FHE in mid-November 2015 and resigned in a text message on December 7, 2015. (FAC ¶¶ 21, 51.) Plaintiff-Intervenor filed a complaint in Alameda County Superior Court on December 4, 2017 against Defendant FHE alleging various state law claims including unpaid wages and constructive discharge. She did not name Bradley Smith as a defendant. (Request for Judicial Notice “RJN” Exhibit A).

Plaintiff-Intervenor filed her Complaint in Intervention in this action on June 21, 2019. (Court Dk. 26.) Plaintiff-Intervenor then filed a First Amended Complaint in Intervention on August 13, 2019. (Court Dk. 41.) The FAC was the first time that Plaintiff-Intervenor attempted to name Bradley Smith as a Defendant in this action.

1        III.     LEGAL STANDARD

2              Federal Rule of Civil procedure 12(b)(6) provides that a defendant may make a motion to  
 3 dismiss for “failure to state a claim upon which relief can be granted.” A dismissal under Rule  
 4 12(b)(6) is proper when a successful affirmative defense or other bar to relief on the claim is  
 5 conclusively established on the face of the complaint. “A claim may be dismissed as untimely  
 6 pursuant to a 12(b)(6) motion only when the running of the statute of limitations is apparent on the  
 7 face of the complaint.” *United States ex rel. Air Control Techs. v. Pre Con Indus.*, 720 F.3d 1174,  
 8 1178 (2013)(internal citations removed.) A claim may also be dismissed under Rule 12(b)(6) “based  
 9 on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under  
 10 a cognizable legal theory.” *Coppola v. Smith*, 935 F. Supp. 2d 993, 1005 (2013) (citing *Johnson v.*  
 11 *Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008); and *Navarro v. Block*, 250 F.3d  
 12 729, 732 (9th Cir. 2001).

13              The Supreme Court has reiterated that “only a complaint that states a plausible claim for  
 14 relief survives a motion to dismiss.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). When the  
 15 expiration of the applicable statute of limitations to a claim is apparent on the face of the complaint,  
 16 a defendant may raise the defense in a Rule 12(b)(6) motion. *Jablon v. Dean Witter & Co.*, 614 F. 2d  
 17 677, 682 (9th Cir. 1980). In determining whether to grant a motion to dismiss based on statute of  
 18 limitations, it can be granted “if the assertions of the complaint, read with the required liberality,  
 19 would not permit the plaintiff to prove that the statute was tolled.” *Id.* at 682. When a court grants a  
 20 motion to dismiss, “...leave to amend need not be granted where amendment would be futile.”  
*Coppola v. Smith*, 935 F. Supp. 2d 993, 1006 (2013).

22        IV.     LEGAL ARGUMENT

23        A.     All of Plaintiff-Intervenor’s Claims Against Bradley Smith are Barred by the Statute  
 24 of Limitations and Thus Plaintiff-Intervenor Has Failed to State a Claim Upon Which  
Relief Can Be Granted and Dismissal is Required

25              Plaintiff-Intervenor’s new claims against Bradley Smith in her First Amended  
 26 Complaint in Intervention are barred by the applicable statute of limitations. The two claims  
 27 Plaintiff-Intervenor now makes against the CEO of her former employer, claims 16 and 18, ran years  
 28

1 ago and thus she has failed to state a claim upon which relief can be granted and dismissal of these  
 2 claims against Bradley Smith is appropriate. (FAC ¶¶ 198-207, 216-222.)

3 First, Plaintiff Intervenor's 16th claim for relief of immediate payment of wages and waiting  
 4 time penalties against Bradley Smith is based on the California Labor Code § 201-203. "A three  
 5 year statute of limitations applies to claims brought under California Labor Code §§ 201-203."  
 6 *Ayala v. Frito Lay, Inc.*, 263 F. Supp. 3d 891, 914 (2017). The three-year statute of limitations  
 7 applies here because the actions for liability were created by state statute, the California Labor Code.  
 8 (See Cal. Civ. Proc. Code § 338(a).) The key date triggering for the statute of limitations here is  
 9 Plaintiff-Intervenor's resignation date, December 7, 2015, as that is the date that the alleged final  
 10 wages were due. (FAC ¶ 51.) Thus, the statute of limitations on the 16th claim for relief ran three  
 11 years later on December 7, 2018 and her attempt to pursue this cause of action against the CEO of  
 12 her former employer has been barred for nearly a year. (See **Chart A** below.)

13 Second, the 18th claim the relief for negligent supervision is based on state tort law, where  
 14 the applicable statute of limitations is two years. (Cal. Civ. Proc. Code § 335.1.) "The statute of  
 15 limitations for a negligent supervision claim is two years. *See Unruh-Haxton v. Regents of Univ. of*  
 16 *Cal.*, 162 Cal. App. 4th 343, 357; Cal. Civ. Proc. § 335.1." *Ford v. Wells Fargo Home Mortg.*, 2008  
 17 U.S. Dist. LEXIS 98963, at \*12-14 (N.D. Cal. Dec. 1, 2008). Here, the statute of limitations for  
 18 Plaintiff-Intervenor's negligent supervision claim is also triggered by her December 7, 2015  
 19 resignation date and thus expired two years later on December 7, 2017. (See Chart A below.)  
 20 Plaintiff-Intervenor has made no effort to state the basis for why she should be permitted to bring  
 21 expired claims against a brand-new Defendant in this action. Thus, Defendants respectfully request  
 22 that this court dismiss Plaintiff-Intervenor's 16th and 18th claims against Bradley Smith as they are  
 23 both barred by the applicable statutes of limitation.

24 **CHART A – Statute of Limitation Analysis for Claims Against Bradley Smith**

25 <b>Claim for Relief</b>	26 <b>Claim</b>	27 <b>Applicable Statute of Limitations</b>	28 <b>Date SoL Ran on the Claim</b>
Sixteenth (16th)	Immediate Payment of Wages and Waiting Time Penalties Pursuant to Cal. Lab Code 201-203	3-years Cal. Civ. Proc. Code § 338(a)	December 7, 2018
Eighteenth	Negligent Supervision	2-years	December 7, 2017

(18th)		Cal. Civ. Proc. Code § 335.1	
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Finally, Plaintiff- Intervenor cannot argue that the statute of limitations equitably tolled as to Bradley Smith because she failed to name him as a defendant in her previous state law action. For equitable tolling to apply the record must show: “(1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and, (3) good faith and reasonable conduct by the plaintiff in filing the second claim.” *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1137-1138 (2001). Here, Plaintiff-Intervenor has at all relevant times known the name and capacity of Bradley Smith evidenced by her inclusion of his name and title in her “Facts Common to All Causes of Action” in her state law complaint. (RJN Ex. A at ¶ 9.) Bradley Smith did not receive timely notice in the state law action because he was not a party to that action. Plaintiff-Intervenor’s two-year delay in attempting to bring Bradley Smith into any litigation as an individual defendant is entirely unreasonable. Thus, because Plaintiff-Intervenor’s claims against Bradley Smith are barred completely, no leave to amend is appropriate and the claims against him should be dismissed entirely.

B. Plaintiff-Intervenor’s Claims 14 to 18 are Untimely, and She Has Failed to Plead Facts that Would Warrant an Equitable Tolling for These Non-FEHA and Non-Title VII Claims

All Plaintiff-Intervenor’s claims for relief not based on FEHA or Title VII are barred by their applicable statutes of limitation – therefore these claims, claims 14 through 18, fail to state a claim for which relief can be granted and their dismissal is required.

First, Plaintiff-Intervenor’s claims 14 and 15 for common law wrongful discharge and demotion are each limited to a two-year statute of limitations. “The two-year statute of limitations set forth in section 335.1 applies to claims for wrongful discharge in violation of public policy. See Cal. Code Civ. Proc. § 335.1 (action for injury to an individual caused by the wrongful act or neglect of another must be brought within two years)...” *Tanner v. Kaiser Found. Health Plan, Inc.*, 2015 U.S. LEXIS 162530 (N.D. Cal. Dec 3, 2015). Further the “statute of limitations on [a] wrongful discharge claim beg[ins] to run on [the] date plaintiff ‘stopped working’ for defendant[.]” *Walker v. Boeing Corp.*, 218 F. Supp. 2d 1177, 1183 fn2 (2002). Here, Plaintiff-Intervenor stopped working

1 for Defendant FHE on or about December 7, 2015, thus the applicable two-year statute of limitations  
 2 for claim 14 ran two years later on December 7, 2017. (See **Chart B** below.) Similarly, the 15th  
 3 claim for wrongful demotion began to run as of the date of the alleged demotion, December 3, 2015.  
 4 (FAC ¶45.) Thus, the applicable two-year statute of limitations for claim 15 ran two years later on  
 5 December 3, 2017.

6 Next Plaintiff-Intervenor's 17th claim for relief is based on the California Labor Code,  
 7 section 1102.5. For a claim commenced under Cal. Lab Code 1102.5, “[t]he appropriate limitations  
 8 period will depend on the nature of the cause of action presented by plaintiff—that is, whether  
 9 plaintiff brings a claim under § 1102.5 or § 1102.5(f).” *Ayala v. Frito Lay, Inc.*, 263 F. Supp. 3d  
 10 891, 917 (2017). When a plaintiff alleges a claim under §1102.5 only, seeking only compensatory  
 11 damages and not civil penalties, then the three-year statute of limitations under 338(a) applies. See  
 12 *Ayala* at 917. Here, Plaintiff-Intervenor does not allege a claim under 1102.5(f) nor does her prayer  
 13 for relief include a request for civil penalties. The applicable statute of limitations for the 17<sup>th</sup> claim  
 14 is three years as determined by CCP 338(a.) Thus, the statute of limitations for the 17<sup>th</sup> claim ran on  
 15 December 7, 2018, three years after Plaintiff-Intervenor's resignation, and her attempt to pursue a  
 16 claim that has been barred for nearly a year is improper. (See **Chart B** below.)

17 Finally, the statutes of limitation for Plaintiff-Intervenor's remaining non-FEHA and non-  
 18 Title VII claims, 16 and 18, are addressed in-depth earlier in this motion in relation to Defendant  
 19 Smith and the same analysis applies here. The statutes of limitation analysis for these remaining  
 20 claims are summarized below in Chart B for reference.

21 **CHART B – Statute of Limitation Analysis for Non-FEHA and Non-Title VII Claims**

Claim for Relief	Claim	Applicable Statute of Limitations	Date SoL Ran on the Claim	Tolled by EEOC Investigation?
Fourteenth (14th)	Wrongful Constructive Discharge in Violation of California Public Policy	2-year Cal. Civ. Proc. Code § 335.1	December 7, 2017	No
Fifteenth (15th)	Wrongful Demotion in Violation of California Public Policy	2-year Cal. Civ. Proc. Code § 335.1	December 3, 2017	No
Sixteenth (16th)	Immediate Payment of Wages and Waiting Time Penalties	3-years Cal. Civ. Proc. Code § 338(a)	December 7, 2018	No

	Pursuant to Cal. Lab Code 201-203			
Seventeenth (17th)	Retaliation in Violation of Lab. Code 1102.5	3-years Cal. Civ. Proc. Code § 338(a)	December 7, 2018	No
Eighteenth (18th)	Negligent Supervision	2-years Cal. Civ. Proc. Code § 335.1	December 7, 2017	No

Anticipating Plaintiff-Intervenor's counter argument, the FAC fails to allege facts to support an equitable tolling argument. The FAC alleges that "the statute of limitations for her FEHA claims would be tolled during the pendency of the EEOC's investigation" and that the EEOC ultimately issued a Notice of Right to Sue on March 7, 2019 in relation to her Title VII claims. (FAC ¶¶ 54-55.) These facts, if true, provide a basis only for Plaintiff-Intervenor's delay as to her claims made under FEHA and Title VII. Notably, Plaintiff-Intervenor's FAC is silent as to any facts that would support an argument that her untimely non-FEHA and non-Title VII claims can be heard in this court. On their face these claims are all clearly barred by their applicable statutes of limitation and Plaintiff-Intervenor cannot allege facts to warrant an equitable tolling argument as to these claims. From the FAC, Plaintiff-Intervenor cannot successfully invoke a tolling doctrine argument and thus dismissal as to timeliness is warranted.

EEOC investigations do not automatically toll the statutes of limitations for state law tort claims, including claims for intentional infliction of emotional distress, when there is no administrative mechanism to resolve those claims. See *EEOC v. Thompson*, 2003 U.S. Dist. LEXIS 25527, \*9-10. As such, dismissal on a 12(b)(6) motion is warranted on the pleadings where some fact apparent from the face of the complaint demonstrates that equitable tolling does not apply to an otherwise time barred claim. Even when the state law tort claim arose out of the same incidents and behavior that form the basis of the EEOC action, the Court recognizes that the wrong underlying the claims are separate and distinct such that an investigation by the EEOC will not toll the statute of limitations. See *EEOC v. Thompson* at \*9-10. Similarly here, Plaintiff-Intervenor's non-Title VII and non-FEHA claims are not tolled by statute, and thus she was required to allege facts sufficient to show some cognizable legal theory by which she could bring these expired state law claims. For example, Plaintiff-Intervenor's claim for immediate payment of wages is entirely unrelated to an

1 EEOC investigation into an allegedly unlawful practice of denying service to persons of perceived  
 2 ethnicity. Without more, Plaintiff-Intervenor has failed to allege facts to support a legal theory of  
 3 equitable tolling to save these time barred claims.

4 Defendants request this court to dismiss Plaintiff-Intervenor's claims 14 through 18 because  
 5 equitable tolling as to these claims is not automatic, and Plaintiff-Intervenor has failed to plead facts  
 6 that would permit such an extraordinary measure to her untimely claims. Even if granted leave to  
 7 amend Plaintiff-Intervenor cannot turn back the hands of time; her non-FEHA and non-Title VII  
 8 claims are time-barred and thus appropriate for dismissal.

9 V. CONCLUSION

10 Plaintiff-Intervenor's First Amended Complaint in Intervention contains five claims that are  
 11 each time barred by their applicable statutes of limitation. No leave to amend can remedy her failure  
 12 to timely assert these claims. Certainly Plaintiff-Intervenor's claims against a brand-new defendant,  
 13 Bradley Smith, have no relation to her previous actions and those claims against the CEO must be  
 14 dismissed entirely. As to Plaintiff-Intervenor's remaining non-FEHA and non-Title VII claims,  
 15 those too are barred by the statutes of limitation. Equitable tolling as to these non-FEHA/non-Title  
 16 VII claims is not automatic, and Plaintiff-Intervenor has failed to allege any facts to support such a  
 17 legal theory.

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19 DATED: AUGUST 27, 2019

BERLINER COHEN, LLP

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BY: /s / Susan E. Bishop

SUSAN E. BISHOP

ATTORNEYS FOR DEFENDANTS FIDELITY HOME  
 ENERGY, INC. AND BRADLEY SMITH

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